Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6201

EDWARD S. IRONS,
Petitioner,

v.

COMMISSIONER OF PATENTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the rulings of the United States Court of Appeals for the District of Columbia Circuit entered September 23 and October 18, 1974.

OPINIONS BELOW

The orders of the United States Court of Appeals for the District of Columbia Circuit dated September 23, 1974 and October 18, 1974 which are unreported, are reproduced *infra*, 1a and 2a. The memorandum order of the United States District Court for the District of Columbia dated January 10, 1974, (*infra* 3a to 15a) is reported at 396 F. Supp. 403. The subsequent memo-

randum order of the district court dated March 11, 1974 (*infra* 16a to 20a) is unreported.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit refusing to vacate the opinions below and remand for a fair hearing before a different judge was entered September 23, 1974 (1a). A timely petition for rehearing *en banc* was denied October 18, 1974 (2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. What is the minimum standard of judicial conduct required by the Fifth Amendment's due process clause in civil federal question cases to insure a fair hearing before an impartial tribunal?

   (a) Specifically, what are the respective relationships of (i) 28 U.S.C. 455 and (ii) the Code of Judicial Conduct (especially Canons 2 and 3) to that minimum standard?

   (b) Is the minimum standard relaxed in any way (i) because an officer of the United States Government in his capacity as such is the defendant, or (ii) relative to plaintiffs in cases arising under the Freedom of Information Act, 5 U.S.C. 552?

2. May a federal judge who has rendered a decision revealing that he sought and obtained evidence on which to base it from one litigant, *ex parte* and without notice to the other, in derogation of Judicial Canons 2(A) and 3(A)(4), deny a timely motion to recuse himself and vacate the offending decision?

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

This case involves construction of the Due Process Clause of the Fifth Amendment to the Constitution and its relationship to 28 U.S.C. 455 and Canons 2 and 3 of the Code of Judicial Conduct.

The Fifth Amendment is as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. 455 provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Judicial Canons 2 and 3 are set forth in their entirety *infra*, pp. 21a to 28a; generalized Canon 2 and its corollary 2A are as follows:

> "*Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in all his Activities.*
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Generalized Canon 3 and its corollaries 3A(4), 3C(1)(a) and 3D are as follows:

"*Canon 3. A Judge Should Perform the Duties of his Office Impartially and Diligently.*

"The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

"A. *Adjudicative Responsibilities.*

* * * *

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

* * * *

"C. *Disqualification.*

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * * *

"D. *Remittal of Disqualification.*

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdraw-

> ing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding."

The Freedom of Information Act, 5 U.S.C. 552, which is only incidentally involved in this petition, is reproduced *infra*, 29a to 32a.

STATEMENT OF THE CASE

The questions before this Court arose in the context of an action to obtain access to certain Patent Office records under the Freedom of Information Act, 5 U.S.C. 552. They are based on the *sua sponte* adoption by a district judge of *ex parte*, off the record consultation between his staff and Patent Office representatives as the means for resolving controverted fact issues on the merits, in the teeth of petitioner's continuously pressed objection to, and motion to strike, all Patent Office "evidence" as to which cross-examination and rebuttal were refused. Petitioner was given no advance notice or opportunity to be heard as to this unusual procedure, but was advised that it had been invoked *after* it was a *fait accompli* in a "memorandum order" dated January 10, 1974 (3a) which refused on the merits all but the most inconsequential portion of the relief then sought by petitioner,[1] admittedly partly on the basis of the *ex parte*, off the record consultation. Petitioner's promptly filed motion to vacate, recuse the judge and reopen proceedings be-

[1] See *infra*, pp. 11-14.

fore a different judge was denied in a further memorandum order dated March 11, 1974 (16a).

Petitioner appealed on March 18, 1974 and moved for summary reversal of the March 11, 1974 order refusing recusal and to remand for a fair hearing before a different judge. This motion was denied on September 23, 1974 (1a) by a two-judge appellate panel without hearing or opinion. A timely petition for rehearing *en banc* was summarily denied *per curiam* on October 18, 1974, again without hearing or opinion (2a).[2]

To put the questions in perspective, a brief review of the history of this action is in order.

The original complaint in this case was filed January 12, 1970 by petitioner, an experienced patent lawyer. It sought access under 5 U.S.C. 552(a)(2) to all then existing unpublished decisions of Patent Office tribunals (known as "manuscript decisions" within the agency and to patent practitioners) "together with such indices as are available".[3] It also sought an order directing the defendant Commissioner of Patents to maintain and make

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[2] The appellate court has thus finally refused petitioner the right of a fair trial before a different judge. The September 23, 1974 order moreover directed petitioner to file a brief on the merits of the questions purportedly decided by the January 10, 1974 memorandum order within 15 days.

Petitioner being disabled to meet the district court's fact findings, many of which are *challenged*, in the circumstance that he has not been fully informed of the premises—adduced in *ex parte* off the record consultation with the Patent Office—on which they rest, nor permitted to advance evidence to meet and rebut them, has succeeded in obtaining a postponement to November 22, 1974 to permit the filing of this petition and has advised the appellate court that once the petition is filed, an additional extension will be sought until 20 days after its disposition in this Court.

[3] The complaint appears at pp. 5-7 of the D.C. Circuit appendix in No. 24,742. A copy of that appendix and the one in D.C. Circuit Appeal No. 74-1365 from which this petition is taken, have been lodged with the Clerk of this Court.

available for public inspection an index of all manuscript decisions rendered after July 4, 1967, pursuant to the mandate of 5 U.S.C. 552(a)(2).

During subsequent proceedings in the district court, petitioner was foreclosed by the trial judge from taking discovery despite attempts to do so. In an opinion and order dated October 25, 1970, reported at 321 F.Supp. 628, the district court directed the Commissioner of Patents to prepare an index of post-July 1967 decisions and make is publicly available, but otherwise dismissed the complaint summarily on the ground of interdiction by 5 U.S.C. 552(a)(3) because "not a reasonable request for identifiable records, but rather a broad, sweeping, indiscriminate request for production, lacking any specificity." (321 F.Supp. at 629).

On appeal the United States Court of Appeals for the District of Columbia Circuit affirmed in an opinion of June 15, 1972, which relied strongly upon a challenged *ex parte* affidavit of Raymond E. Martin, a Patent Office employee and member of the Patent Office Solicitor's staff to hold that "the contours of the records thus described are so broad in the context of the Patent Office files as not to come within a reasonable interpretation of 'identifiable records'" under § 552(a)(3).[4] See *Irons* v. *Schuyler*, 465 F.2d 608, 613 (D.C. Cir. 1972), certiorari denied, 9 U.S. 1076 (1972).

The opinion nevertheless held that "appellant is entitled to a remand" for consideration of the complaint's request for access to pre-existing indices and stated:

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[4] The district court opinion thus purportedly "affirmed" does not mention the Martin affidavit or any facts it purportedly shows.

The holding as to "identifiable records" is flatly in conflict with the Fourth Circuit's construction of that term. See *Wellford* v. *Hardin*, 315 F. Supp. 175 (D. Md. 1970), *aff'd* 444 F.2d 21 (4 Cir. 1971); *Ethyl Corp.* v. *Environmental Protection Agency*, 478 F.2d 47 (4 Cir. 1973) and *Sears* v. *Gottschalk*, 502 F.2d 122 (4 Cir. 1974), certiorari pending as No. 74-584 on unrelated points of law.

". . . There appears to be some difference between the parties as to the facts regarding these indices. The District Court will have in mind, should the parties be unable to agree, whether those differences preclude resolution of the matter by summary judgment. We of course leave open the question whether the remand for consideration of the request for indices might lead to further light on the request for manuscript decisions themselves, not excluding the possibility of such amendment to the complaint as the District Court may permit in the exercise of a sound discretion should motion to that end be made." (465 F.2d at 614).

In a timely filed motion to withdraw opinion and vacate judgment petitioner on June 26, 1972 brought to the attention of the appellate court certain facts demonstrating the Martin affidavit to be at least partially false. The Patent Office did not controvert. The court of appeals was careful, in its supplemental opinion on petition for rehearing filed August 21, 1972, to avoid further reference to the challenged Martin affidavit and to emphasize that the problem was one of definition of the requested unpublished decisions. The appellate court specifically suggested that:

". . . In the developments on remand with respect to the indices, it may be that sufficient light will be shed upon the problem to enable a request for the manuscript decisions to be made in a manner which brings it within the Act. *In camera* inspection by the court of the indices and contents of volumes of manuscript decisions which the record indicates may exist, is not precluded, to aid the court in passing upon the issue of disclosure and the related issue of exemptions. With the cooperation of the parties in preserving whatever non-disclosure the exemptions authorize, while at the same time seeking compliance with the purpose of the Act to inform the public as to the manner in which public agencies

perform their functions, a satisfactory solution hopefully can be achieved on the remand." (465 F.2d at 615).

On remand, the district court again refused to permit petitioner to obtain discovery. In particular, the judge thrice frustrated petitioner's efforts to take the deposition of the Patent Office affiant Martin to explore the "difference between the parties as to the facts regarding . . . indices" noted by the appellate court, to cross-examine him on his sworn and unsworn *controverted* representations of fact to the district court or for any other purpose. The Commissioner was nevertheless permitted to advance as evidence of controverted facts, over petitioner's continuous objection, both the original, concededly *at least* partially false, Martin affidavit, a *second* also controverted Martin affidavit and self-serving unsworn alleged "fact" statements in Patent Office briefs.

Specifically, the district judge first issued a written order granting a Patent Office motion to quash a deposition notice and subpoena to the witness Martin on May 7, 1973. When orally asked to reconsider on May 10, 1973 the judge summarily refused, stating: "Mr. Martin is counsel. I don't permit deposition of counsel to be taken. . . . Mr. Martin is counsel for the Patent Office. I don't think he should be deposed. . . . I don't think it is proper to take the deposition of counsel" (Appendix in D.C. Cir. No. 74-1365 at p. 76).

The right to take the Martin testimony was again refused in the January 10, 1974 memorandum order wherein petitioner's written motion to reconsider the abovementioned May 7, 1973 order was "denied as moot" (15a).[5]

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[5] The characterization of this motion as "moot" necessarily depends on the district court's substitution of its own off the record investigatory foray for petitioner's right to meet and rebut the Patent Office "evidence", *inter alia*, by deposing Mr. Martin.

Importantly, the sole hearing in the district court after remand which was held May 10, 1973 and is referred to in the January 10, 1974 memorandum order (4a) *preceded* the filing of petitioner's two contempt motions, his motion for leave to file a second amended complaint[6] and his motion for partial summary judgment, each of which the memorandum order, *after* the district court's *ex parte* consultation with the Patent Office, flatly denied except in one minor detail.[7]

Petitioner has not been informed as to the names of persons who actually took part in the off-the-record consultation on November 30, 1973 between at least one member of the court's staff and Patent Office representatives in Suitland, Maryland and Arlington, Virginia, nor does petitioner have access to facts showing the nature of the discussions, the precise identity of *all* records actually inspected, the oral explanation which accompanied their display or the like. The district judge in refusing to recuse himself self-servingly characterized the excursion as "a physical identification of material" (19a), "a physical inspection of certain items" (20a), but failed to indicate the nature of the associated commentary or other aspects of the full circumstances which would permit assessment of that characterization's accuracy. The district judge attempted to justify its short-circuiting of plaintiff's rights of cross-examination and rebuttal in this *ex parte*, off the record manner by opining self-servingly that "judicial economy and economy of the parties was served" (17a).

Notably, however, *before* the court's November 30, 1973 *ex parte* foray with the Patent Office representatives took

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[6] A proposed first amended complaint was withdrawn voluntarily before the district court ruled on it.

[7] To wit, the district court ordered production *only* of case name indices to bound volumes of unpublished decisions covering the years 1853 to 1923.

place, the Commissioner's own counsel acknowledged under oath in the *only* interrogatory answer ever furnished by defendant throughout the entirety of the litigation that *any ex parte* contact between Patent Office representatives and the court would be highly improper.[7]

After the *ex parte* consultation, the Commissioner never disputed that the irregular procedure invoked was in violation of the Code of Judicial Conduct nor denied that the judge had made himself a material witness within the meaning of 28 U.S.C. 455, but alleged that this was not prejudicial to petitioner, citing the release in the January 10, 1974 memorandum order of case name indices to the 1853 to 1923 bound volumes of unpublished decisions as a ruling "favorable" to petitioner.

This attitude overlooks the facts that in this January 10, 1974 memorandum order:

> (a) Petitioner's post-May 10, 1973 motion for partial summary judgment, based on a "statement of material facts as to which there is no genuine issue"[8] that the Commissioner *never* controverted, sought release in their entirety of (i) the manifestly "identifiable" *and identified 175 bound volumes* of un-

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[7] Plaintiff's Interrogatory 14 and defendant's answer are quoted in their entirety in the March 11 decision refusing to recuse and vacate the tainted January 10, 1974 order (19a). The district judge there avoided the real thrust of the interrogatory answer by incorrectly ascribing to petitioner an accusation that the answer was false at the time it was given, and then refuting his own straw man charge, which petitioner never made. Thus, the district court said:

> "Plaintiff accuses the United States Attorney of a false answer by assuming that an inspection by the Court's staff November 30, 1973, meant that there must have been some contact prior to November 15, 1973. In fact, plaintiff's assumption is wrong, and the answer of the United States Attorney was not, as plaintiff claims, a false one." (19a).

[8] This "statement of material facts. . ." is reproduced *infra*, 33a to 34a.

published decisions from 1853 to 1954, *including* their internal case name indices and (ii) the Patent Office docket card indices and the file wrapper jacket indices from which additional unpublished Patent Office decisions could be identified—and that the district judge *denied* this motion apart from the token release of internal case name indices for the 1853-1923 bound volumes.[10]

(b) The district court *denied* petitioner's post-May 10, 1973 contempt motion framed as a result of the Commissioner's admission in a brief filed May 23, 1973 that docket index cards had been willfully destroyed subsequent to the filing of the complaint in this action,[11] adopting a self-serving unsworn

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[10] The Commisisoner on March 15, 1974 filed but did not serve a notice of appeal from that portion of the January 10, 1974 memorandum-order, but never perfected the appeal. On June 25, 1974 a motion for leave to withdraw it was filed which the court of appeals on October 11, 1974 denied without prejudice to the filing of a similar motion in the district court.

[11] While the Patent Office was careful not to cite precise dates on which the docket index cards were destroyed, its admission was that those covering the period ended December 31, 1969—i.e., a period which expired 12 days before the complaint was filed—relative to abandoned applications and those covering the period up to December 11, 1973 (almost two years *after* the filing of the complaint) relative to allowed applications, had been destroyed as of May 23, 1973. These docket index cards were not only a part of the subject matter sought by the complaint but were material evidence indicating the location and identity of the manuscript decisions also sought by the complaint. *If* they had been maintained in existence, they would have put the lie to the Commissioner's representation before the court of appeals prior to remand that it would be necessary to search the file of every patent application in existence to find the requested manuscript decisions—a representation which petitioner consistently challenged on the basis of the existence of the docket index cards but was never permitted to prove. This challenged representation was at the core of the appellate affirmance of the *first* district court decision based on *the* allegedly *unidentifiable* character of the unpublished decisions.

[Footnote continued on page 13]

Patent Office representation in the same brief that these cards are not "meaningful indices" even though *no facts* have ever been adduced on the record to support that assertion.

(c) The district judge *denied* plaintiff's motion for leave to file its second amended complaint, carefully drawn *to define only "identifiable records" pursuant* to criteria set forth in the August 21, 1972 rehearing decision in the court of appeals (465 F.2d at 614-5).

(d) The district judge *denied* the petitioner's motion for a contempt citation because of the Commissioner's failure to comply fully with the district court's order of October 25, 1970 requiring indexing of post-July 4, 1967 decisions on the basis of (i) the *ex parte* inspection at Arlington, Virginia,[12] (ii) a misrepresentation of petitioner's position, contrary to the record, that "[p]laintiff makes no allegation that the Patent Office is not satisfactorily indexing its manuscript decisions . . ." (13a) in direct conflict with the statement of petitioner's counsel at the May 10, 1973 oral hearing that ". . . the index is deficient. It doesn't contain all the decisions. . . ."[13]

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[11] [Continued]

As this Court said in *Merrimack River Savings Bank* v. *City of Clay Center*, 219 U.S. 527 (1911):

> ". . . The willful removal beyond the reach of the court of the subject-matter of the litigation, or its destruction. . . is, in and of itself a contempt of the appellate jurisdiction of this court. "219 U.S. at 535-6."

See also *Clay* v. *Waters*, 178 F. 387, 391 (8 Cir. 1910).

[12] The January 10, 1974 memorandum decision flatly holds:

> "Upon inspection of the indices being maintained, the Court finds full compliance with the October 1970 Order". (13a).

[13] The quotation is from page 79 of the appellate appendix in No. 74-1365. The entire transcript of the May 10, 1973 hearing appears at pages 49-80 of that appendix.

and (iii) a clearly erroneous finding in the teeth of the complaint that "material referred to in 5 U.S.C. § 552(a)(2)(B) and (C) . . . . were never requested in plaintiff's original comp'aint, and as a result, they were not incorporated into the Order of October 26, [sic] 1970" (13a). *In fact* the prayer of the original complaint, paragraph (b) sought an order "requiring the defendant to maintain and make available for public inspection and copying a current index of manuscript decisions as required by 5 U.S.C. 552 (a)(2)".[1] Manifestly, 5 U.S.C. 552(a)(2) categorically *includes* all of its subparts A, B and C. The district court's October 25, 1970 order, moreover, is by its terms generic to *all of* "5 U.S.C. 552(a)(2)." See 321 F.Supp. at 629. The January 10, 1974 *nunc pro tunc* rewriting of this October 25, 1970 order to exclude manuscript decisions within the scope of 5 U.S.C. 552(a)(2)(B) and (C) in the face of *ex parte* off-the-record consultation with Patent Office representatives was *not* "favorable" to petitioner.

In the March 11, 1974 memorandum order the district judge did not deny that his conduct had been unethical or that he had effectively become a material witness for the Commissioner in contravention of 28 U.S.C. 455. He acknowledged that the challenged procedure was adopted because he "deemed it advisable to get a better perspective on the materials actually in issue" (17a)—or in other words, he needed evidence on controverted facts, but took the tack that petitioner had a burden to show "prejudice" consequent from the November 30, 1973 *ex parte* off-the-record consultation as a prerequisite to recusal. He then held this burden had not been dis-

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[1] See p. 7 of the appellate appendix in No. 24,742 of the District of Columbia Circuit.

charged,[15] though knowing full well that petitioner had no access to and no means even of adducing the full facts pertinent to those consultations, such facts being within the judge's own control and that of the Patent Office, and suppressed from petitioner by both.

Petitioner's position that he need not demonstrate any of the *ex parte* off-the-record consultation to have been specifically the basis for a finding of fact or conclusion of law adverse to him in view of the gross violation of the Code of Judicial Conduct and 28 U.S.C. 455 was wholly ignored by the district judge, as was petitioner's reliance upon the teachings of *Rapp* v. *Van Dusen*, 350 F.2d 806 (3 Cir. 1965) and *Texaco* v. *Chandler*, 354 F.2d 655 (10 Cir. 1965), both of which hold it to be among the requisites of a fair hearing that the judge not only avoid actual evil but the merest appearance of such evil in his conduct of the proceedings.

The subsequent summary appellate rulings, made without opinion, equally failed to deal with this important question.

REASONS WHY THE WRIT SHOULD BE GRANTED

(1) *The district court, with the approbation of the court of appeals, en banc, has so far departed from the accepted standards of procedure in civil litigation that review should be granted.*

Petitioner was deprived of the rights to confront Patent Office evidence presented at the Suitland, Maryland and Arlington, Virginia *ex parte* consultation on November 30, 1973 with the district court's staff, to meet such advocacy and argument as occurred during that *ex parte* consultation, to cross-examine the Patent Office affidavit

[15] The March 11, 1974 order specifically holds "The Court finds no element of prejudice to the plaintiff in the action of November 30, 1973." (20a).

witness Martin and to rebut the alleged evidence presented by the Commissioner on the record.

The denial of petitioner's motion to vacate filed promptly after the fact of *ex parte* consultation was revealed in the January 10, 1974 memorandum order (3a) is in the teeth of the procedural standards which this Court has held the Fifth Amendment alone to require in federal question cases generally and, when combined with the Fourteenth Amendment, in administrative and judicial hearings, both civil and criminal, in the states.

In *Goldberg* v. *Kelly*, 397 U.S. 254, 269-270 (1970) involving the right of a welfare recipient to notice and a hearing before termination of benefits, this Court emphasized that

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E.g., ICC* v. *Louisville & N.R. Co.*, 227 US 88, 93-94, . . . (1913); *Willner* v. *Committee on Character and Fitness*, 373 US 96, 103-104 . . . (1963). What we said in *Greene* v. *McElroy*, 360 US 474, 496-497 . . . (1959) is particularly pertinent here . . .":

In *Armstrong* v. *Manzo*, 380 U.S. 545,552 (1965), a case relied on by the majority in *Goldberg*, the Court unanimously voided a state court child custody award made without notifying the father or awarding him a hearing, saying

> "A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 US 385, 394, 58 L.Ed. 1363, 1369, 34 S. Ct. 779. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only

> that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place."

Citing *Armstrong*, the Fifth Circuit in *Carter* v. *Morehouse Parish School Board*, 441 F.2d 380 (5 Cir. 1971) held that "A ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process." To the same effect, see *United States* v. *Cabbage*, 430 F.2d 1037 (6 Cir. 1970).

In *Frito-Lay, Inc.* v. *Morton Foods, Inc.*, 316 F.2d 298, 300 (10 Cir. 1963) cited by the Fifth Circuit in support of its ruling in *Carter*, *supra*, the Tenth Circuit reversed a trial judge's *sua sponte* summary disposition on the merits of a trademark infringement claim without hearing any of the proffered evidence, saying

> "We have had recent occasion to disapprove, but perhaps with insufficient emphasis, the summary disposition of causes through procedures not in accord with the Rules of Civil Procedure. Wirtz, Secretary of Labor v. Young Electric Sign Company, 10 Cir., 315 F.2d 326. And where, as here, a complex case is concluded upon its merits after what amounts to no more than the opening statement of counsel we must be clearly shown that the judgment is soundly based. '* * * An expedious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in court.' Arrick v. Rockmont Envelope Co., 10 Cir., 155 F.2d 568 573."

In similar vein the Fourth Circuit in *Miller* v. *United States*, 455 F.2d 833, 836 (4 Cir. 1972) held that claimants to an informer's share in fines levied against those convicted of violating the Refuse Act of 1899, 33 U.S.C. 411 were entitled to

> "... notice that their claim was being adjudicated, the right to confront and to cross-examine adverse witnesses, the right to participate in the proceedings by counsel and to adduce relevant, admissible evidence in their own behalf, and the right to a decision based upon evidence adduced at such a hearing."

The district court's essential holding in this case goes far afield from these established standards, with the approval of the court of appeals, to hold that the need for expeditious disposition is paramount and the right of a plaintiff to be heard of secondary importance, *at least* when the defendant is a functionary of the United States government or the case arises under the Freedom of Information Act.

(2) *The departure from accepted standards of procedure in civil litigation is aggravated by the district court's departure from accepted standards of judicial conduct.*

28 U.S.C. 455 requires that a judge of the United States "*shall* disqualify himself in any case in which . . . he has been a material witness. . . ." This Court has never defined the statutory limit nor expressed itself upon the subject of whether the statutory language negates the use of judicial discretion in determining whether disqualification shall be granted in response to a timely motion. In *Quercia* v. *United States*, 289 U.S. 468 (1933) and *In re Murchison* 349 U.S. 133 (1955), however, this Court granted relief by virtue of conduct which rendered a trial judge an actual or potential material witness for one side. In *Quercia* a new trial was granted because the trial judge added to the evidence before the jury by volunteering his own testimony that a defendant in a criminal case who wipes his hands during his testimony is almost always lying. In *Murchison*, the trial judge had conducted a secret "one man grand jury" investigation and being obviously unable to rid himself of the impressions gained thereby, had implicitly rendered himself

a potential material witness in any subsequent criminal contempt trial.

In this case, the judge did not deny that the procedure which he chose for resolving controverted facts effectively made him a material witness but attempted to justify his conduct as "vastly different" (20a) from that in *Murchison* because "this litigation has been long and difficult. Many motions have been considered, it has been heard by the court of appeals and again by this court on remand. An extensive record exists." (20a)[16]

In *Fillipon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919) this Court ordered a new trial in a case in which the judge had instructed the jury in writing on a matter of law in the absence of counsel for both parties, saying "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is empaneled until its discharge after rendering a verdict."

Relying, *inter alia*, on *Fillipon*, the Third Circuit in *Arrington* v. *Robertson*, 114 F.2d 821, 823 (1940) held that

> "Orderly procedure requires that a plaintiff be accorded the same right [to be present in person or

[16] Actually, though the litigation has now been in existence for more than four years, it has hardly consumed much of the district court's time. The appellate appendix in No 24,742 shows that two brief oral hearings on June 1, 1970 and September 21, 1970 occurred prior to the October 25, 1970 dismissal order. The sole hearing after remand was on May 10, 1973 *prior* to the filing of the various motions purportedly disposed of in the January 10, 1974 memorandum order, at least partly on the basis of the *ex parte* off the record consultation with the Patent Office. The "extensive record"—to the extent the proceedings may properly be so characterized—is not evidentiary but consists of copies of motions, briefs and the like. See the appendices in D.C. Circuit Appeals 24,742 and 74-1365.

> by counsel at every stage of his trial]. A party or his counsel may waive this right expressly. He may also waive it by voluntarily absenting himself from the courtroom in which the trial is being conducted . . . but . . . the parties are entitled to anticipate and bound to presume, in the absence of notice to the contrary, that all such proceedings will take place in open court in the courtroom assigned for the trial and will be reported by the court stenographer. Consequently a party or his counsel who voluntarily absents himself from the courtroom consents to such proceedings only as take place in the courtroom during his absence but not to proceedings which take place elsewhere. . . ."

In *Rapp* v. *Van Dusen*, 350 F.2d 806, 812 (3 Cir. 1965), in a ruling quoted and followed by the Tenth Circuit in *Texaco, Inc.* v. *Chandler*, 354 F.2d 655 (10 Cir. 1965), it was emphasized that "litigants are entitled . . . to a judge whose unconscious responses in the litigation may be observed in the presence of all parties and their counsel."

Applying these established standards of judicial conduct which require the presence of counsel for both parties during presentation of both controverted facts *and* legal argument, this Court in *Murchison*, *supra*, the Third Circuit in *Rapp* and the Tenth Circuit in *Texaco*, all concluded that judicial conduct must in every case be such as to afford a hearing that not only *is fair* but *appears fair*, and accordingly disqualified trial judges from further participation in cases where their conduct was or appeared to be tainted.

In *Murchison*, this Court, quoting from *Offut* v. *United States*, 348 U.S. 11 (1954), specifically said that "to perform in the best way 'justice must satisfy the appearance of justice' " (349 U.S. at 136). In *Rapp* and *Texaco* it was emphasized that "the proper administration of justice

requires not only actual impartiality, but also the appearance of a detached impartiality." [17]

This requirement in judicial trials generally was simply brushed aside by the district judge who tacitly conceded at least the appearance of impropriety in his own conduct but deemed that his misconduct did not "prejudice" petitioner.

(3) *The role of the Code of Judicial Conduct adopted by the American Bar Association in 1972 relative to judicial behavior in litigated cases should be defined as a part of this Court's power and duty to supervise the conduct of proceedings in the lower courts.*

This Court—and in particular the Chief Justice—has several times recently noted the need for more rigorous enforcement of elementary standards of ethics and competence among members of the legal profession. Thus, for example, the Chief Justice in his August 8, 1974 letter to the president of the American Bar Association referred to the 1970 report to the ABA Special Committee on the Evaluation of Disciplinary Enforcement chaired by former Associate Justice Clark as presenting "a melancholy picture of the failure of our profession to enforce elementary standards of ethics in the relations between lawyers and their clients and between lawyers and the courts" and recommended that the matter be made "a priority measure on the agenda of the Association", emphasizing that "the legal profession is a generation behind the need to place its own house in order." Federal judges are, of course, a part of the legal profession. The ethical standards followed by such judges set the tone for the ethical performance of the whole profession. So long as less than proper conduct is tolerated among the

[17] These principles were applied by one district judge of the United States Court for the District of Columbia to disqualify himself in *United States* v. *Quattrone*, 149 F. Supp. 240 (D.D.C. 1957).

federal judiciary, it can hardly be expected that mere lawyers will, as a group, exact a higher standard of performance from themselves.

The 1972 Code of Judicial Conduct expressly interdicts the *ex parte* consultation which occurred in this case,[18] and mandates that judges shall disqualify themselves whenever "impartiality might reasonably be questioned" including when they have "personal knowledge of disputed evidentiary facts".[19] This case poses the highly important question of whether this Code of Judicial conduct—as a matter of common knowledge adopted at least in part in response to public pressure created by revelations made during the course of the Senate hearings on the confirmation to this Court of former President Nixon's unsuccessful nominees, Haynsworth and Carswell—has any real vitality.

The need for an expression by this Court as to the role of the Code of Judicial Conduct is underscored by the fact that the Court, in implementing its rulemaking powers under 28 USC §§ 2071 and 2072, has not seen fit to prescribe criteria for proper judicial conduct in the lower federal courts, leaving the matter instead to the slow pace of case by case development.[20] The American Bar Association's effort to fill the gap should either be approved or disapproved to the end that judges, lawyers and litigants will know whether the 1972 Code is a meaningful yardstick by which to measure the propriety of judicial conduct, or just another exercise in legal drafting.

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[18] See Judicial Canons 2A and 3A4, *supra*, pp. 2-3.

[19] See Judicial Canon 3C1(a) quoted *supra* 4. Judicial Canon 3D, *supra* pp. 4-5, defines the only conditions under which remittal of disqualification is permissible and affords *no* remittal under any circumstance for activities of the character that occurred in this case.

[20] As, *e.g.*, in *Murchison*, *Quercia*, *Fillipon* and similar actual cases.

CONCLUSION

The writ should be granted,

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